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In the Supreme Court of the United States

OCTOBER TERM, 1987

INDEPENDENT COMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC., PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioner argues that states may not authorize the acquisition of in-state national banks by out-of-state bank holding companies.

1. Section 3 of the Bank Holding Company Act of 1956 (the BHCA), 12 U.S.C. 1842, provides that a bank holding company must obtain the approval of the Federal Reserve Board (the Board) before acquiring a bank or substantially all of a bank's assets. Section 3(d) of the BHCA, which is generally referred to as the Douglas Amendment, prohibits the Board from approving a bank holding company's application to acquire any interest in "any additional bank located outside of the State in which" the bank holding company maintains its principal operations. But the Amendment permits such interstate acquisitions if "the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is

specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. 1842(d).

This case arises out of the application of First City Bancorporation of Texas, Inc. (First City), a Houston-based bank holding company, to acquire a newly-organized national bank based in Sioux Falls, South Dakota. By statute, South Dakota expressly permits out-of-state bank holding companies to acquire newly-organized state-chartered and national banks located in South Dakota, as long as the acquired bank has only a single office, and is located and operated in such a manner that it is "not likely to attract customers from the general public in the state to the substantial detriment of existing banks in the state." S.D. Codified Laws Ann. §§ 51-16-40, 51-16-41 (Supp. 1987).[1] Pursuant to the provisions of this South Dakota law, First City applied to the state banking commission for permission to acquire a newly organized national bank that would conduct First City's credit card operations, which are directed to customers outside South Dakota. The state banking commission approved the proposed acquisition over petitioner's objections, subject to the necessary approvals of the Comptroller of the Currency (the Comptroller) and the Board. After the Comptroller approved the organization of a new national bank, First City sought the Board's approval to acquire the bank (see Pet. App. A6-A7).

2. Petitioner filed comments before the Board, offering two objections to approval of the application. First, petitioner argued that the Douglas Amendment authorizes states to permit the interstate acquisition only of state-chartered banks and not of nationally-chartered banks

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[1] The South Dakota banking commission also has the power to place such additional conditions on its approval of such acquisitions as it "deems necessary" (§ 51-16-42), but this authority has never been exercised (see Pet. App. A28).

(see Pet. App. A36-A37). Second, petitioner argued that, even if the Douglas Amendment generally permits interstate acquisitions of national banks by bank holding companies, the conditions placed by South Dakota law on the operations of First City's newly chartered national bank in this case conflict with other federal banking laws (see *id.* at A38-A39).

The Board rejected both of petitioner's arguments. Relying upon the language and the legislative history of the Douglas Amendment, the Board concluded that the Amendment "applies to the interstate acquisition of any bank, national or state-chartered" (Pet. App. A37). The Board noted that the Amendment's initial clause prohibits approval of the interstate acquisition of "any additional bank," including both national and state-chartered banks; the second clause outlines the circumstances under which a state may "authorize such an acquisition" (*ibid.* (emphasis omitted)). As the Board concluded, "when the flat prohibition on interstate bank acquisitions is lifted by a state with respect to state banks, the Douglas Amendment itself lifts the prohibition * * * with respect to national banks" (*id.* at A38).

The Board also found "no merit" in petitioner's argument that the South Dakota statute conflicts with other federal banking laws (Pet. App. A39). The Board noted that state restrictions on national banks that have been acquired by virtue of the Douglas Amendment are authorized by the Amendment itself (*ibid.*). And the Board held that, in any event, the South Dakota restrictions do not conflict with the federal law setting out the powers of national banks; in reaching this conclusion, the Board relied upon a previous finding by the Comptroller that the South Dakota statute does not "so restrict the operations of the proposed bank as to be incompatible with the framework of federal law" (*ibid.* (quoting Op. Comp. Curr. on the Application to Charter City Banks (South Dakota), N.A., at 12 n.8) (Nov. 11, 1980)).

3. Petitioner then filed a petition for review in the Court of Appeals for the District of Columbia Circuit, which affirmed the Board's determination (Pet. App. A1-A29). The court found petitioner's reading of the Douglas Amendment to be "tortured" and "incompatible with the actual language of the statute" (*id.* at A12). Instead, the court concluded that "[t]he plain meaning of the Amendment in its entirety supports the Board's reasoning," adding that "nothing in the legislative history even remotely suggests a congressional intent contrary to Congress' chosen words" (*id.* at A12, A13). The court also affirmed the Board's holding that the South Dakota restrictions do not conflict with federal banking laws, finding that the Comptroller had reasonably determined that the restrictions do not "undermine[] the safety and soundness of the bank or interfere[] with the bank's ability to fulfill its statutory obligations" (*id.* at A27).[2]

4. The decisions of the Board and the court of appeals are clearly correct and, as petitioner concedes (see Pet. 7, 13), do not conflict with any decision of this Court or any other court of appeals. Review is therefore unwarranted.

a. Relying on the Douglas Amendment, the Board has repeatedly and consistently approved the interstate acquisition of national banks by bank holding companies.[3]

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[2] The court did reject the Board's alternative view that the South Dakota restrictions were affirmatively authorized by the Douglas Amendment (Pet. App. A18-A23). There is no need to consider the validity of this conclusion, however, because the court plainly was correct in finding that South Dakota and federal law do not conflict.

[3] As the court of appeals noted, for the past 15 years the Board has "routinely" approved the acquisition of national banks by out-of-state bank holding companies where permitted by state law (Pet. App. A9). See, *e.g.*, *First Kentucky Nat'l Corp.*, 70 Fed. Res. Bull. 434 (1984); *Bank of New England Corp.*, 70 Fed. Res. Bull. 374 (1984); *BankAmerica Corp.*, 69 Fed. Res. Bull. 568 (1983); *NCNB Corp.*, 68 Fed. Res. Bull. 54 (1982); *Citicorp*, 67 Fed. Res. Bull. 181 (1981). Indeed, the Board decision in *Bank of New England Corp.* was affirmed both by the Second Circuit and by this Court without any suggestion that the acquisition of national banks might pose special problems under

The Board, of course, is an "authoritative voice on the meaning of a federal banking statute" (*Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159, 168 (1985)), and its interpretation thus is entitled to "substantial deference." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137, 142 (1984). Indeed, since petitioner concedes that federal law in this area is "ambiguous" (Pet. 10) at best, the Board's interpretation must be upheld so long as it is "based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

b. The Douglas Amendment reads, in pertinent part:

> [N]o application * * * shall be approved * * * which will permit any bank holding company * * * to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of *any additional bank* located outside the State in which the operations of such bank holding company's banking subsidiaries were principally conducted * * * *unless* the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

12 U.S.C. 1842(d) (emphasis added). The Amendment thus generally prohibits out-of-state bank holding companies from acquiring state *or* national banks within a state ("any additional bank") "*unless*" state law "specifically authorize[s]" the acquisition "of a State bank by an out-of-State bank holding company." The only reasonable reading of the statutory language, and in particular of Congress's use of the word "unless," is that when a state chooses to permit the acquisition of state banks by out-of-

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the Douglas Amendment. *Northeast Bancorp* v. *Board of Governors*, 740 F.2d 203 (2d Cir. 1984), aff'd, 472 U.S. 159 (1985).

state holding companies, federal law automatically permits the acqusition of national banks in that state. As the court of appeals explained (Pet. App. A12 (emphasis in original)):

> By its terms, the first clause of the Amendment prohibits the interstate acquisition of both state and national banks. The second clause provides that this carte blanche prohibition stands *unless* the state permits the interstate acquisition of 'such shares or assets of a State bank.' The ordinary meaning of the language compels the conclusion that the entire prohibition lifts upon the state's authorization of interstate acquisition of a 'State bank' located within its borders.

The Amendment's legislative history also supports the Board's interpretation. As this Court recognized in *Northeast Bancorp*, the Douglas Amendment was "[intended] to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act." 472 U.S. at 171; see also 102 Cong. Rec. 6860 (1956) (remarks of Sen. Douglas). The McFadden Act, 12 U.S.C. 36(c), was intended to promote "competitive equality" between state and national banks by permitting national banks to branch within their home states to the same extent that those states allow state banks to branch. See *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 133 (1969). In this case, state and national banks can be treated comparably only if the Douglas Amendment is interpreted to permit the acquisition of both national and state banks by out-of-state bank holding companies, once the acquisition of state banks is permitted by state law. In contrast, petitioner's interpretation would treat state and national banks differently by prohibiting the acquisition of national, but not of state, banks.[4]

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[4] Petitioner's assertion that the purpose of the Douglas Amendment was to "facilitate state's rights" (Pet. 10), even if accurate, is beside the

c. The South Dakota banking statute also does not "place impermissible restrictions on the operations of national banks" acquired by out-of-state bank holding companies, as petitioners assert (Pet. 13). A state law affecting the operation of national banks is invalid only if it "expressly conflicts" with federal law, "and either frustrates the purpose of such national legislation or impairs the efficiency of [national banks] to discharge the duties, for the performance of which they were created." *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896).[5] In this case, the Board correctly relied upon the Comptroller's adherence to his earlier determination (made during his consideration of a previous application by another out-of-state bank holding company) that the South Dakota statute at issue here does not so limit the operation of national banks "as to be incompatible with the framework of federal law" (Pet. App. A39 (quoting Op. Comp. Curr. at 11-12 (Nov. 19, 1980))).

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point: petitioner's reading of the Amendment would divest anyone of power to permit out-of-state bank holding companies to acquire in-state national banks, even if, for example, the national bank was a failing institution. Thus, far from advancing states' rights, petitioner's interpretation would frustrate the efforts of the states to promote the health and safety of their banking industries. Petitioner also relies on remarks by Senator Payne (Pet. 10-11 (citing 102 Cong. Rec. 6862 (1956)). But as the court of appeals noted (Pet. App. A14), "[i]t is difficult to discern" whether Senator Payne approved of the interstate acquisition only of state-chartered banks or rather of all banks located within a given state.

[5] Contrary to petitioner's assertion (Pet. 16), *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), did not hold that the Douglas Amendment forbids all state restrictions on bank holding company activities. *Lewis* stated only that is was "doubtful" that the Douglas Amendment had *expanded* the scope of permissible state regulation by affirmatively "authoriz[ing] state restrictions" (*id.* at 47), although the Court made it clear that states may enact laws (such as the one in this case) that permit forms of interstate banking that otherwise would be barred by federal laws. *Lewis* leaves the states free to exercise their traditional power to regulate national banks, so long as that regulation does not conflict with federal law.

As the Comptroller observed, there is no requirement in the National Bank Act (the statute that delimits the authorized activities of national banks) that banks engage in the full range of activities that are permitted by federal law. The Comptroller also noted that the choice not to engage in particular activities "is a business decision which does not necessarily result in a course of action incompatible with the National Bank Act or other federal statutes" (see Pet. App. A25 (quoting Op. Comp. Curr., *supra*, at 12 n.8)). And the Comptroller found that the South Dakota restrictions pose no danger to the safety and soundness of national banks (see Pet. App. A25). These judgments, as the court of appeals correctly noted, "require consideration of the particular legal and business circumstances of the individual banks" and thus are "within the particular expertise of the Comptroller and reserved to his chartering authority" (*id.* at A27).[6] The Board was therefore justified in relying upon the Comptroller's determination that there was no conflict between federal banking law and the South Dakota statute in this case.

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[6] This Court has recognized that the Comptroller's decisions concerning the National Bank Act are entitled to great weight. *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971). And the Comptroller has repeatedly approved the chartering of national "credit card" banks. See *Deposit Guaranty Corp.*, 71 Fed. Res. Bull. 807 (1985); *First Kentucky Nat'l Corp.*, 70 Fed. Res. Bull. 434 (1984); *Citicorp*, 70 Fed. Res. Bull. 431 (1984); *First Maryland Bancorp*, 68 Fed. Res. Bull. 320 (1982); *Provident Nat'l Corp.*, 68 Fed. Res. Bull. 260 (1982).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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